

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA

PLAINTIFF/RESPONDENT

v.

Civil No. 04-6070
Criminal No. 6:01cr60017

DONNIE R. LONG

DEFENDANT/MOVANT

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

Pending before this court is the motion and amended motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. #140, 141) filed herein by the defendant/movant, Donnie R. Long (hereinafter “Long”).

Before the undersigned for consideration is Long’s motion to withdraw his § 2255 motion (Doc. #145) and his alternative motion to transfer his case to the United States Court of Appeals for the Eighth Circuit. (Doc. #146)

In his pending motions, Long concedes that he previously filed a *pro se* § 2255 motion which was ultimately dismissed. (T. #125) That motion was denied by order of this court entered on November 17, 2004. (Doc. #132) Long further notes that leave must be granted by the United States Court of Appeals for the Eighth Circuit for Long to file a second or successive § 2255 motion. (Doc. #145, 146)

Long is correct. This court lacks jurisdiction to consider the pending successive §2255 motion in that leave has not been granted by the court of appeals for the filing of the motion. *See* 28 U.S.C. § 2255 (movant must obtain leave from the appropriate court of appeals authorizing the district court to consider a second or successive § 2255 application); *Vancleave v. Norris*, 150 F.3d 926, 927 (8th Cir. 1998)(these restrictions are not an unconstitutional

suspension of the writ of habeas corpus); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996)(Only the Court of Appeals may authorize commencement of a second or successive petition); *Wainwright v. Norris*, 958 F.Supp. 426, 431 (E.D. Ark 1996) (citing *Nunez*).

As this court lacks jurisdiction to consider Long's pending § 2255 motion, the motion must be dismissed. *United States v. Avila-Avila*, 132 F.2d 1347, 1348-49 (10th Cir. 1997) (district court lacks jurisdiction to consider a successive petition absent authorization from the appropriate court of appeals); *see also United States v. Lurie*, 207 F.3d at 10779 ("§ 2255 motion is not inadequate or ineffective merely because § 2255 relief has already been denied, or because [a prisoner] has been denied permission to file a second or successive § 2255 motion.").

The undersigned has considered Long's alternative request that this case be transferred to the United States Court of Appeals for the Eighth Circuit. However, it is found that the proper disposition is for the pending § 2255 motion to be dismissed for lack of jurisdiction without prejudice to Long seeking leave of the court of appeals for the filing of his successive § 2255 motion.

Conclusion:

Accordingly, it is recommended that Long's pending § 2255 motion be dismissed for lack of jurisdiction without prejudice to Long seeking leave of the United States Court of Appeals for the Eighth Circuit to file a second or successive § 2255 motion.

The parties have ten (10) days from receipt of our report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger de novo review by the district court.

DATED this 21st day of August 2006.

/s/ Bobby E. Shepherd
HON. BOBBY E. SHEPHERD
UNITED STATES MAGISTRATE JUDGE.